

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARLOS ANTONUOUS CARMICHAEL,

Defendant-Appellant.

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UNPUBLISHED

May 2, 1997

No. 186910

Saginaw Circuit Court

LC No. 94-009837-FC

Before: Young, P.J., and Markey and D.A. Teeple,\* JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of both first-degree murder and felony murder, MCL 750.316(1); MSA 28.548(1), armed robbery, MCL 750.529; MSA 28.727 and two counts of possession of a firearm while committing a felony, MCL 750.227b; MSA 29.424(2). The court sentenced defendant to terms of imprisonment of life without parole for the murder convictions, fifteen to forty years for the armed robbery conviction and two years for the felony-firearm convictions. We affirm in part, reverse in part and remand.

Defendant first contends that this Court should reverse his convictions because the preliminary examination was unduly suggestive. One witness previously had failed to identify defendant at a lineup. At the preliminary examination, however, where defendant was the only African-American man in orange jail garb, the witness identified defendant as the gunman who shot the victim. The trial court's decision to admit the witness' identification testimony was not clearly erroneous. In *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995), this Court held that when a defendant does not contend that the lineup was unduly suggestive, subsequent identification by a witness at a preliminary examination is admissible at trial. The witness' failure to identify the defendant at the lineup is relevant only to the credibility of the testimony. *Id.* See also *People v Petrella*, 124 Mich App 745, 755-756;

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\* Circuit judge, sitting on the Court of Appeals by assignment.

336 NW2d 761 (1983) and *People v Manuel Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975). Consequently, this issue does not provide grounds for reversal.<sup>1</sup>

Defendant also argues that the trial court erred when it failed to instruct the jury regarding the dangers of eyewitness evidence, despite defendant's request for CJI2d 7.8 and the court's agreement to give that instruction. Defendant has not preserved this issue for review because he failed to object at trial to the court's apparent inadvertent omission of the requested instruction. *People v Harris*, 190 Mich App 652, 660-661; 476 NW2d 767 (1991). No miscarriage of justice occurred because the jury instructions, taken as a whole, adequately informed the jury of the factors it was to consider in evaluating witness testimony. MCL 769.26; MSA 28.1096; *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Nor did the failure to give the requested instruction prejudice defendant in presenting his case to the jury. See *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972). The witness testified that she failed to identify defendant at the lineup and the court read to the jury as part of the instructions defendant's theory of defense that he was not present during the shooting.

Defendant next claims that the trial court abused its discretion when it excluded the testimony of defendant's expert on memory and perception to rebut the witness' identification of defendant. We cannot agree. Defendant's expert admittedly knew nothing about the case, had not attended the lineup or court proceedings and had not interviewed any witnesses. Relying on *People v Hamilton*, 163 Mich App 661; 415 NW2d 653 (1987), defendant argues that psychological expert testimony should be admitted when it will assist the jury in determining the credibility of a statement. In *Hamilton*, the defense offered the psychologist's evaluation of the defendant to explain the defendant's motive for his confession. *Id.* at 662-663. *Hamilton* is thus distinguishable on its facts from the instant case because it involved expert testimony regarding the defendant's psychological makeup. In this case, the proffered expert testimony concerned the psychological characteristics of persons other than defendant. Consequently, since the expert had neither seen nor spoken to these persons nor attended the lineup, his testimony was not relevant, and thus, properly excluded. *People v Hill*, 84 Mich App 90, 95-96; 269 NW2d 492 (1978).

Finally, defendant claims that his convictions for first-degree murder, felony murder and armed robbery violate his constitutional double jeopardy protections. US Const, Am V; Const 1963, art 1, § 15. Although defendant failed to raise this issue below by a motion for resentencing, this Court may grant review where a defendant claims the deprivation of a fundamental constitutional right. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). A defendant cannot be convicted of both first-degree premeditated murder and felony murder for a single offense: "Two convictions, though they result in only one sentence,<sup>2</sup> can still punish the defendant in several ways." *People v Densmore*, 87 Mich App 434, 441; 274 NW2d 811 (1978). Further, multiple convictions and sentences for first-degree murder and felony murder for a single death violate double jeopardy. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). The majority of case law holds that this Court should affirm the first-degree conviction and vacate the felony murder conviction. *Id.* Accordingly, we vacate

defendant's felony murder conviction. Because we vacate that conviction, defendant's conviction for armed robbery does not violate double jeopardy principles. *Id.* at 95-96.

Affirmed with regard to defendant's first-degree murder, armed robbery and felony-firearm convictions; however, we vacate defendant's conviction for felony murder and remand for the court to amend the judgment of sentence. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Jane E. Markey

/s/ Donald A. Teeple

<sup>1</sup> Defendant's reliance on the dissent in *People v Solomon*, 47 Mich App 208; 209 NW2d 257 (1973), which was adopted by our Supreme Court at 391 Mich 767; 214 NW2d 60 (1974), is misplaced because the dissent only found that the trial court erred in failing to hold a hearing to determine whether, under the totality of the circumstances, the procedures at the preliminary hearing were unduly suggestive. *Solomon*, 47 Mich App at 218 (Lesinski, J., dissenting). In this case, the trial court held a hearing and determined, under the totality of the circumstances, that the preliminary examination was not conducted in a manner to create a substantial likelihood of misidentification.

<sup>2</sup> Although the jury convicted defendant of both felony murder and first-degree premeditated murder, the court sentenced defendant to a single life sentence without parole for both convictions.